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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 50.

MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE, APPELLANT,

vs.

THE CITY OF COLUMBUS, L. H. CHAPPELL, MAYOR, ET AL., APPELLEES.

SUPPLEMENTARY BRIEF FOR APPELLANT.

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(19,805.)

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At the end of this brief we append a copy of the act of the General Assembly of Georgia, of December 3, 1902, authorizing the city of Columbus to construct, own, and operate its system of waterworks, and alleged by the bill to be legislation impairing the obligation of the contract claimed to exist, and to constitute the security of the bondholders for whom complainant sues as trustee.

I.

The bill raises a Federal question, which, as we contend, gives the circuit court jurisdiction, irrespective of the question of diversity of citizenship. This contention we trust we have made clear in the original brief.

There are, however, certain views advanced in the brief for appellees to which we wish to make more explicit reference.

We do not join issue with opposing counsel as to the correctness of the legal proposition that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, "if it plainly appears that such averment is not real and substantial."

The above language, taken from the opinion of this court in the Newburport case (193 U. S.), is merely the converse statement of the principle several times laid down by the court as the rule determining the question of jurisdiction:

"The jurisdiction of the circuit court is established when it is shown that the company had or claimed to have a contract with a State or municipality which the latter had attempted to impair, and so long as the claim is apparently made in good faith and is not frivolous, the case can be heard and decided on the merits."

Pacific Electric Railway Company *vs.* Los Angeles, 194 U. S., 112.

City Railway Company *vs.* Citizens' Street Railroad Company, 166 U. S., 557.

Illinois Central Railroad Company, 180 U. S., 28.

The above inquiry upon a logical analysis resolves itself into two branches, which constitute its primary elements:

1. Does the bill show that the Waterworks Company had, or plaintiff claims that it had, a contract with the municipality, and is the claim one which is apparently made in good faith and which is not frivolous?

2. Is there legislation of the State or municipality impairing or "attempting to impair" the contract which it is claimed exists?

Perhaps the latter proposition is not stated quite as broadly as this court, in using the above language, means to state it. The language, "so long as the claim is apparently made in good faith and is not frivolous," would seem to have reference to both elements or terms of the compound proposition; and a claim apparently made in good faith and not frivolous,

that the attempted impairment exists, gives the court jurisdiction to determine that question. The question whether there is in fact such impairment or attempted impairment is not jurisdictional, but goes to the merits—that is to say, is a matter proper to be determined by the court after disposing of the question of jurisdiction.

The latter proposition would, under this view, be as follows:

2. Is it claimed by plaintiff that there is legislation of the State or municipality impairing or attempting to impair the obligation of the contract, and is such claim one which apparently is made in good faith and is not frivolous?

We do not, however, deem it necessary to consider which of these two more accurately states the meaning of the rule.

In any view, we think a comparison of the facts of the case made by the bill with the Vicksburg case, recently decided, will make it perfectly plain that there has been legislation within the rule.

II.

Of the two elements the existence of which gives jurisdiction, the motion to dismiss, according to the words in which it is couched, draws in question only the second jurisdictional element, namely, whether there has been legislation which can be regarded as impairment of the contract, if such contract exists. Those grounds of demurrer which go to the contract itself are left out of the motion to dismiss.

The motion (omitting so much as relates to the question of diversity of citizenship) asked to dismiss for want of jurisdiction—

"Because there is no federal question involved on which the jurisdiction of this court can be sustained independently of diversity of citizenship, for that the action of the city in proceeding to issue bonds for construction of its own system of water works constituted at most a mere breach of the contract not equivalent to legislation affecting or im-

pairing the obligation of the contract between the city and the Columbus Waterworks Company as assignee of Thomas R. White, in contravention of the Constitution and laws of the United States."

It will be noticed that the motion assumes, and apparently concedes, the existence of a valid contract.

There is no hint that there will be any contention that there is no valid contract, nor even a claim of contract apparently made in good faith and not frivolous.

The brief for appellees in this court, however, raises certain objections and makes certain criticisms more or less directly aimed at the contract itself or to particular features of it.

An examination of these objections, however, will, we think, make it clear that they go not to the jurisdiction of the court, but go rather to the merits on questions which may be raised by appropriate pleadings as affirmative defenses, to be dealt with by the court after the preliminary question of jurisdiction is disposed of. Instead of going to the jurisdiction, a determination of these questions presupposes jurisdiction.

We do not, therefore, deem it necessary at this place to refer further to any of these objections, save only the objection that the power of the municipality to make the contract is founded rather upon a general authority possessed by all Georgia municipalities, under the general language, or, as it is sometimes called, the "general welfare clause," of their charters, as consistently held by the highest court of the State throughout its entire history, and does not rest upon specific legislation in express terms conferring the power or defining the method in which it shall be exercised.

Counsel for appellee do not question the existence of the power, but they seek to draw a distinction between the constitutional protection against impairment afforded to contracts named in terms in some special statute, or so described in some specific words of a special statute directing the municipality to enter into the contract, and the protection afforded

by the constitution to other contracts authorized by valid laws, but not specifically named or referred to in a special statute or special grant of power.

We are unable to see how this can make any difference. If the contract was valid when made, it is entitled to protection against impairment, and we deem it to be entirely immaterial whether the contract was authorized by general law or general language in a particular charter or specific words by way of a particular grant contained in a special statute dealing with this specific subject and no other.

The Georgia law touching the authority of municipalities to make contracts for water supply is clearly stated by the Supreme Court of the State in City of Dawson *vs.* Water Co:

"That a municipal corporation may exercise the power of taxation for the purpose of providing its inhabitants with water for domestic use, as well as to provide the city with water, is the settled law of this State, and is not questioned in the present case (Citing *Frederick v. Augusta,* 5 Ga., 561; *Rome v. Cabot,* 28 Ga., 50; *Wells v. Atlanta,* 43 Ga., 67). A supply of water for these purposes may be procured by a municipal corporation either by building itself the works necessary for the purpose or by making a contract with other persons to supply the same. In *Lott v. Waycross, supra,* this court held that a municipal corporation could contract an indebtedness for supplying lights to a town, without submitting the question to a vote of the people."

City of Dawson *vs.* Dawson Waterworks Company, 106 Ga., 696, p. 709 of opinion.

In that case, as well as in the cited cases, the court was dealing with charters which contained no specific words granting the power, but the power was deduced from the general words used in all municipal charters, the so-called "general-welfare clause."

III.

The motion to dismiss, predicated, as it is, solely upon the proposition "that the action of the city in proceeding to

issue bonds for construction of its own system of water works constituted at most a mere breach of the contract, not equivalent to legislation affecting or impairing the obligation of the contract," rests, we think, upon a misconception of what was decided by this court in the Dawson Waterworks case (197 U. S., 178).

Passing over the fact that in that case (differing in this respect from the case at bar) the first step of the city was to repudiate the contract and to refuse to pay, and that in the opinion of the court this repudiation and continued refusal constituted the gist of the city's conduct complained of by the bill, "and the other acts were subsequent, subordinate to, and in aid of them," and that the principal fact, and not the secondary, subordinate acts, should determine whether the case fell on the same side of the line with the St. Paul case, or on the same side with the Walla Walla case, it will be seen that the decision was based on a failure of the more loosely drawn pleading to develop and make clear in that case what is distinctly pleaded and made perfectly clear in the present bill.

In the Dawson Waterworks case this court says:

"In the case before us there was no legislation subsequent to the contract, and it is not even shown that there is color of previous legislation for the city's acts. Those acts are alleged to be unawful, and the allegation would be maintained by showing that they were not warranted by the laws of the State."

In the case at bar the conduct of the city begins with no refusal to pay. There is in the ordinance no refusal to pay or any denial that it owes for the water consumed.

The ordinance is a submission to popular vote of the proposition that the city build its own system of waterworks, issuing a designated amount of bonds "for the purpose of building, establishing, equipping and operating a system of waterworks," and providing for the levy of an annual tax for the purpose of paying off the principal and interest of the bonds, and contains elaborate provisions for carrying the

legislative scheme fully into effect, creating "a separate and distinct department of the city government," consisting of four members to be elected by the people, and of the mayor as an *ex officio* member, who "shall be known as the water commission, and said commission shall have control of the building, operating and management of the water works" (Record, p. 49). This elaborate piece of legislation by ordinance, attached to the bill as an exhibit, fills four full pages of the printed record (pages 46, 47, 48, 49).

It is shown by the bill both that there was "legislation subsequent to the contract" and "color of previous legislation for the city's acts."

"Legislation subsequent to the contract" is found in the act of the General Assembly of December 3, 1902, a copy of which is appended at the end of this brief. This act of the General Assembly is distinctly pleaded in the bill, alleged to be legislation or attempted legislation impairing the obligation of the contract; the contract, the obligation impaired, and the manner in which it is impaired are all distinctly pointed out, and protection is claimed and jurisdiction invoked under the impairment-of-contract clause of the Constitution and also under the Fourteenth Amendment.

The "color of previous legislation for the city's acts" is also shown.

The ordinance, referred to in the bill and attached thereto as an exhibit, shows that the proposition was submitted to the voters "in accordance with the laws of this State," and that the ordinance was to become effective in the event the voters at such election gave the required assent and after the bonds so authorized "shall have been validated as by law required."

The bill also pleads and sets forth as an exhibit the ordinance adopted after the foregoing ordinance received the required assent of the voters and became operative as a law; which later ordinance directs that bids be invited for the bonds, and this advertisement is also pleaded and attached to the bill as an exhibit.

It is recited therein:

"The issue and sale of these bonds have been authorized by the qualified voters of the city of Columbus at an election held on the 4th day of December, 1902, as provided by law, pursuant to sections 377 to 381, inclusive of vol. 1 of the Civil Code of Georgia for 1895, and pursuant to the provisions of the constitution as embodied in paragraphs 1 and 2 of section 7, article VII. Said bonds have been validated and confirmed by the judge of the superior court of Muscogee county, in conformity with an act of the General Assembly of Georgia, approved December 6th, 1897 (See Acts 1897, p. 82), which judgment of validation has been passed upon and affirmed by the Supreme Court of Georgia."

Record, p. 51.

In the same exhibit reference is also made to the aforementioned act of the General Assembly.

The section of the Georgia constitution referred to is as follows:

ARTICLE 7, SECTION 7, PARAGRAPH 1. *"Debt of Counties and Cities Not to Exceed Seven per cent.*—The debt hereafter incurred by any county, municipal corporation, or political division of this State, except as in this constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose to be held as may be prescribed by law; but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this constitution, may be authorized by law to increase at any time the amount of said debt three per centum upon such assessed valuation."

"PAR. 2. *County and City Bonds, How Paid.*—Any county, municipal corporation, or political division of this State, which shall incur any bonded indebtedness under the provisions of this constitution shall, at or before the time of so doing, provide for the assessment and collection of an an-

nual tax, sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness."

Civil Code of Georgia (ed. 1895), §§ 5893, 5894 (vol. 2).

Section 377 of volume 1 of the Code of Georgia, above referred to, is as follows:

"377 (508*i*). *Notice of Election on Issue of Bonds.*— When any county, municipality or division shall desire to incur any bonded debt, as prescribed in paragraphs 1 and 2, section 7, article 7, of the constitution of 1877, the election required shall be called and held as follows, to wit: The officers charged with levying taxes, contracting debts, etc., for the county, municipality or division, shall give notice for the space of thirty days next preceding the day of election, in the newspaper in which the sheriff's advertisements for the county are published, notifying the qualified voters that on the day named an election will be held to determine the question whether bonds shall be issued by the county, municipality or division. In said notice he shall specify what amount of bonds are to be issued, for what purpose, what interest they are to bear, how much principal and interest to be paid annually, and when to be fully paid off."

The other laws referred to would needlessly swell the brief. They are laws of the State, and the ordinance was adopted under color of these laws.

As held by the highest court of the State in Heilbron *vs.* Cuthbert, 96 Ga., 312, and City of Dawson *vs.* Waterworks Co., 106 Ga., *supra,* a city which has passed an ordinance of this character and proceeded to obtain the assent of the voters, as provided by the foregoing section of the State constitution and the foregoing public laws, acquires thereby the power and authority to erect and maintain its own system of waterworks.

And this without the assistance of a special statute such as the City of Columbus was acting under in this case.

It was therefore shown in the case at bar that there was "color of previous legislation for the city's acts."

Under such circumstances a municipal ordinance is legislation within the meaning of the impairment-of-contract clause of the Constitution.

That an ordinance of this character is legislation within the meaning of the Constitution has been too often decided to longer admit of question.

Davis & Farnum Mfg. Co. *vs.* Los Angeles, 189 U. S., 207, 216, 217, and citations.

St. Paul Gas Light Co. *vs.* St. Paul, 181 U. S., 142, 148.

Walla Walla case, 172 U. S., 1, 10.

The Dawson Waterworks case holds nothing which is in conflict with this well-established principle. It merely holds that, in the absence of anything to show that the city's acts were in pursuance of legislative authority or under color of legislative authority, an averment in the bill that the city's acts are unlawful is consistent with the idea that they were not warranted by the laws of the State.

IV.

The ordinances of the city are not, however, to be considered as standing by themselves, or as deriving their legislative quality simply from the fact that they purport to deal with matters governmental in their character and were passed under color of previous legislative authority.

These ordinances are to be considered in connection with the act of the General Assembly of 1902, with which they form parts of one and the same legislative scheme. From this act they cannot be separated. The act enters into the ordinances, fixes their character, and gives to them their meaning. When the voters of the city of Columbus, on December 4, 1902, voted, they voted not upon the ordinance in the form it passed in council on September 14, 1902, but with all the provisions of the act of December 3, 1902, read into it.

This would necessarily result, even if there were no intention on the part of the city council that it should be so, for the acts of the General Assembly being, relatively to the ordinances of the city, the higher law, the ordinances must give way where there is conflict or take on additions and new features wherever the statute so enacts.

But it appears that there was an intention on the part of the city that the State should legislate. Under Code, section 377, above quoted, the election would have been held four weeks from the date of the ordinance—that is to say, four weeks from September 14, 1902—but for the fact that the date was fixed far enough ahead to permit of the desired legislation. It was known, of course, what day the legislature would meet; it was known also what day would be the first day for local bills under the rules, and it is a known fact that local bills, when favored by the local representatives, go through without opposition as matter of legislative courtesy. It was therefore a very simple matter to calculate ahead just when the bill would become a law, and the election was fixed for the next succeeding day, December 4, 1902.

The act of December 3, 1902, is complete in itself. It in terms authorizes the city of Columbus to construct, own, operate, and maintain its own system of waterworks. It works out the entire scheme to the minutest details. It creates officers and administrative machinery. It would require no popular election or municipal ordinance to complete the scheme, but for the constitutional and statutory requirements that all municipal bond issues must receive the preliminary sanction of a popular vote.

Thus we have:

1. A constitutional provision constituting a sort of referendum.

2. Legislative statutes carrying out this constitutional purpose and giving to ordinances receiving such popular sanction the force of law.

3. Charter power to adopt the ordinance and submit it to the voters for their ratification.

4. An ordinance, a submission, an election, an adoption by the people, and a further ordinance declaring the result.

5. Validation by the superior court and the Supreme Court.

6. A special law by the General Assembly confirming and completing the legislative scheme above set forth.

All these cover such important governmental functions as taxation, expenditure of public revenues, incurring of municipal indebtedness, creating of new municipal offices, to be filled at newly authorized elections; fire protection, water supply for drinking and other domestic purposes, street sprinkling, sewerage, and, lastly, the destruction, ruthlessly and needlessly, of $400,000 of property, invested upon the faith of the city's solemn obligation, in order to carry out a public-service contract valid when made, according to the laws of the State as interpreted by the decisions of its highest court up to that time.

If all this conjunction of State constitution, general statutes, charter, special statute, ordinance, referendum, validation by courts, etc., does not collectively rise to the dignity of legislation, it is difficult to conceive just what it would take to constitute legislation within the meaning of the impairment-of-contract clause of the Constitution.

V.

It is, however, argued on behalf of appellees that the act of December 3, 1902, cannot be construed as either authorizing the city's action or as a ratification by the State of any previous action on the part of the city which would otherwise be illegal; that the city's right to build waterworks existed

under the general provisions of its charter, without the need of drawing any aid or vitalizing force from the act of December 3, 1902, and was founded upon laws in existence when the contract was made; and that therefore the act of December 3, 1902, cannot be regarded as legislation impairing the obligation of the contract between the city and the Waterworks Company.

This argument, it seems to us, loses sight of more than one important consideration.

1. In the first place, the city of Columbus did not, at the time the act of December 3, 1902, was passed, possess the right to construct and operate a system of waterworks of its own. Granted that the general-welfare clause in its charter gave it the power to exercise the power of taxation for the purpose of providing its inhabitants with water for fire protection and for domestic use, and that it could procure a supply of water for these purposes either by building itself the works necessary for the purpose or by making a contract with other persons to supply the same; but when the city adopted the latter of these modes and entered into a binding contract with the Waterworks Company or its assignor, by which it granted the Waterworks Company the exclusive right of furnishing water for the aforesaid purposes during the period stipulated, the city's right and power to build its own waterworks was held temporarily in abeyance by reason of the obligation of its contract. The operation of the higher law contained in the Constitution had the effect of superseding the powers deduced from the general-welfare clause of the city's charter, so far as the latter came into conflict with the impairment-of-contract clause of the Constitution. We likewise grant that there were general laws authorizing the city to proceed in a specified manner to incur a bonded indebtedness. But this is subject always to the proviso that a city which has by contract granted to a water company the exclusive right during a limited time of furnishing water

for fire protection and for the domestic use of its inhabitants has no right or power under these general laws to incur a bonded indebtedness for the purpose of doing what the impairment-of-contract clause of the Constitution forbids it to do.

It is no reply, as opposing counsel argue, that the act of the legislature of the State could only authorize the city to proceed lawfully, not in contravention of the Constitution by a disregard of any valid contract obligation. It is true that the State statute, though in positive and unequivocal terms purporting to confer upon the city the authority to build and operate waterworks of its own, cannot authorize the city to proceed in contravention of law by a disregard of any valid contract obligation. But this is true only for the reason that the Constitution furnishes a barrier too high for it to leap over and too strong for it to break through. It is made the duty of the national courts in a peculiar sense to defend that barrier, and wherever a statute comes from the proper source and possesses the outward semblance of law, and would be effective as law but for the barrier interposed by the Constitution, a party claiming a right under the Constitution is entitled to invoke the aid of the national courts; and where the amount in controversy is sufficient he is permitted to do this in a national court of first resort.

If, as argued by counsel, the act of the legislature, though in terms broad enough to authorize the city to build its own waterworks, did not in fact authorize it to proceed "in contravention of law by a disregard of any valid contract obligation," it can only be because the Constitution interposes a bar to prevent, and this fact furnishes a reason for the exercise by the national courts of a jurisdiction suitably invoked and not a reason for declining jurisdiction; and whether there is a valid contract obligation is a matter for the national courts to determine for themselves, where the bill makes a case which renders such determination necessary and the claim is apparently made in good faith and is not frivolous.

2. In the second place, granting that the city might have proceeded to erect waterworks under general laws and in the exercise of the power conferred upon it by the general-welfare clause of its charter, yet it must be conceded that the General Assembly had the amplest power to legislate upon the subject (leaving out of view, of course, the question of the contract rights protected by the Constitution), and such ligislation would bind the city. It will not be denied that, because the charter may have already given the city the right to provide a water supply in any way it might see fit, it was entirely competent for the legislature to amend the charter and limit the city to a particular way, thereby excluding all other ways previously open to it and defining and making special a power which before that was general (provided only, of course, nobody's constitutional rights were thereby violated). The legislature could fix a power which before that was floating. Will it be said that this is not legislation, and that when the city proceeds to erect its waterworks it need not proceed under this legislation, but may act as though such legislation did not exist? If, then, there is in force a valid contract which obliges the city to take all of its water from a water company, and grants the water company the exclusive privilege of furnishing water for a period of time which has not yet expired, and the act of December 3, 1902, authorizes the city before the expiration of that time to build and operate waterworks of its own, notwithstanding the city's obligation not to do so, this act clearly is legislation or attempted legislation impairing the obligation of the contract.

3. We think counsel's argument leads logically to this dilemma:

If the City of Columbus, under the rules recognized in the Dawson Waterworks case (197 U. S., *supra*), passed the ordinance for the construction of its waterworks under authority of previous legislation, then such ordinance was itself a law within the meaning of the impairment-of-contract

clause of the Constitution. If no such authority existed, then the act of December 3, 1902, was legislation within the meaning of this constitutional provision.

VI.

It is argued that the act of December 3, 1902, was subsequent in time to the ordinance of the city for the erection of its own system of waterworks.

We are at a loss to see what difference it can make whether the ordinance preceded the statute or the statute preceded the ordinance. They are so chained together as to constitute one legislative act.

We, however, dispute the proposition that the statute is to be regarded as subsequent in time to the ordinance. The ordinance, it is true, was adopted by the city council in September, but it was wholly ineffectual as a law authorizing the construction of waterworks till ratified at the election held December 4.

VII.

It is argued that the act of December 3, 1902, is not a law impairing the contract, because the contract is not mentioned by name therein.

The effect is the same, whether the contract is mentioned or not; for, if the contract obligated the city not to enter the field it had expressly stipulated it would not enter, a law which expressly authorized the city to do the precise thing which the city by its contract had bound itself not to do would impair the obligation of this contract. The result would follow no more absolutely if the contract were mentioned in every section of the statute.

VIII.

Opposing counsel in their brief make the criticism that the bill charges that the ordinances, statute, etc., constitute an "attempt to impair" the obligation of the contract.

This verbal criticism of one detached clause or phrase of the bill will be seen to be without merit when the averments are taken in their entirety.

The words criticized are the correct terms as approved by the decisions. It is more correct to speak of "attempted impairment" than "impairment," because the Constitution says there shall be no impairment, and what the Constitution says shall not be, can be only "attempted," since the Constitution stands in the way of the success of the attempt; and statutes which contravene the Constitution are "color" of legislation and "attempts" at legislation, but they are not law.

The State never passes a law impairing the obligation of a contract, because the Constitution withholds the power. It may "attempt" it; in the history of our country the States have frequently made the attempt, but the Constitution strips all such statutes and enactments of the quality of law.

When the attempt is made, the national courts have jurisdiction, and this involves necessarily the jurisdiction to inquire and determine the question whether in fact such attempt is made.

But we do not understand that it is the office and function of a motion to dismiss for want of jurisdiction to raise objections of this character.

Nice verbal criticisms will not be resorted to by the court in order to sustain a motion to dismiss for want of jurisdiction, made at a late stage of the case, after the evidence has all been taken and the report of the master rendered thereon, particularly where demurrers had been overruled, where the court in a carefully prepared opinion had after a hearing fully sustained the equities of the bill, and thereafter the plaintiff under orders of the court has expended large sums

of money in carrying out the contract which it is the object of the bill to protect against impairment.

The other matters urged in the brief for appellees are, we think, not jurisdictional.

We, however, deem it proper to outline our views in regard to the more important of these questions, and we invite the attention of the court thereto, in the event the court thinks it proper to go into those matters at this time.

1. *Exclusive Franchise.*—The complainant insists that the contract gave to the Waterworks Company, for the period specified in the contract, the exclusive right, by means of its system of waterworks constructed for that purpose, to supply water for the use of the city and its inhabitants, and that the obligation of this contract will be impaired if the city, proceeding under the acts of the legislature and under the ordinances in question, establishes and maintains an independent, separate system of waterworks in competition with those of the Waterworks Company. These questions having been aptly raised by the complainant's bill, "the case is plainly one arising under the Constitution of the United States."

Knoxville Water Company *vs.* Knoxville, 200 U. S., 22, 32.

In that case the court, though holding that the case was one of which the circuit court clearly had jurisdiction, held that the contract did not in fact confer the exclusive right claimed.

The exclusive feature in the contract in the present case is not distinguishable from that in the Vicksburg case.

Section 14 of the contract reads as follows:

"XIV. The mayor and council are to grant a franchise for the exclusive privilege of maintaining and operating the works for a period of thirty (30) years; or until such time as they may be purchased by the city; and during such time

to rent from Thomas R. White the fifty (50) double fire hydrants at an annual rental of eighty (80) dollars each, equal to four thousand ($4,000) dollars per year—payable quarterly; and on future extensions the rate shall be seventy-five ($75) dollars per hydrant; but whenever the number of hydrants shall exceed ten (10) per mile, on any mile of pipe, there shall be a discount of ten per cent. for each additional hydrant on said mile of pipe. In the primary distribution of the fifty hydrants on the line of street mains reference shall be had to the value of property contiguous, and a number of hydrants greater than ten may be placed on a mile of pipe without this reduction in price per hydrant, until additional hydrants, beyond fifty (50) are placed on the original five miles of pipe, when such reduction shall occur on one hydrant for each such addition."

Record, p. 36.

Further aid on this question is to be derived from section 21, which is as follows:

"XXI. The mayor and council reserve the right to the undisturbed use of the four-inch water pipes, connections and attachments, now located on Broad, Randolph, and Front streets, for fire purposes only, the supply of cisterns and engine practice. Said water pipe not to be used for other water supply, or street sprinkling, after the completion of the water works, except with the consent of Thomas R. White."

Record, p. 38.

By ordinance the city subsequently consented to the assignment of the contract to the Columbus Waterworks Company, and accepted the work.

Record, pp. 44, 45.

We think the intent of the contract to grant the exclusive right is perfectly clear.

While the rule is "if on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given it, those doubts are to be solved in favor of the State," the court in so announcing the rule also lays it down that "it is the duty of courts not to defeat the intention of parties

to the contract by a strained interpretation of the words employed by them."

It inheres in the city's power to contract for water supply, to include in such contract as an incident to the principal undertaking a stipulation of this character, whereby the Waterworks Company may be protected against ruinous competition.

Walla Walla, 172 U. S., 1.
Vicksburg, 185 U. S., 65; 202 U. S., 453.

There is nothing in the Georgia law to restrict the broad powers municipal corporations there possess with regard to providing a water supply.

Counsel for appellees cite Georgia Constitution, article 1, section 3, paragraph 2, which is as follows:

"No bill of attainder, *ex post facto* law, retroactive law, or law impairing the obligation of contracts, or making irrevocable grants of special privileges or immunities shall be passed."

Civil Code of Georgia, sec. 5730.

This provision has reference, primarily at least, to corporate charters as distinguished from ordinary contracts, and was intended to remove such charters from the operation of the decision in the Dartmouth College case.

It may be doubted whether it was intended to apply to ordinary contracts, even where a city or the State was one of the parties, so as to forbid the parties making such contracts irrevocable.

But if this clause of the constitution relates to contracts like the present one, it is to be read in connection with the next succeeding clause of the same section, which is as follows:

"No grant of special privileges or immunities shall be revoked except in such manner as to work no injustice to the corporators or creditors of the incorporation."

Constitution of Georgia, Art. 1, sec. 3, par. 3; Code, sec. 5731.

The language of the Georgia constitution upon this subject is practically identical with the language of the Mississippi constitution, construed by this court in the Vicksburg case, 202 U. S., 453, 464, 465, and upon this question that case is controlling.

2. *Debt.*—The contention urged in the brief for appellees, that the contract to pay for future water rentals created a debt, we do not deem it necessary to reply to, further than to say that the cases cited were decided subsequently to the making of the contract and subsequently to the deed of trust for bondholders of the Waterworks Company, and under such circumstances this court will determine the question for itself.

The earlier decisions of the Georgia court tend to sustain the direct contrary of the proposition, being in line with the decision of this court in the Walla Walla case.

If the court wishes to pursue the investigation further, we invite the court's attention to the opinion of Judge Newman in the present case.

Record, pp. 59, 60, 61.

3. *Police Power.*—As we understand the position of counsel for appellees, it is their contention that the recital in the preamble to the ordinance of September 14, 1902, that "the Columbus Waterworks Company has totally failed to supply the city of Columbus and its inhabitants with a sufficient quantity of pure and wholesome water," and that "the public health of the city of Columbus is paramount in importance to every other consideration; and the owning by the city of Columbus of her own waterworks would result in a great saving in the cost of fire protection, sanitation, and other purposes," gives to the ordinance the character of an exercise of the police power.

An examination of the ordinance will show, we think, that the foregoing recitals and the other recitals making up the

lengthy preamble were in realty only meant as an address to the voters for campaign purposes.

In the act of the General Assembly there is no such recital or, indeed, any preamble at all.

We do not understand, however, that the preamble changes in any way the character of the ordinance, so far as it affects the right of the party whose contract right it impairs.

If the contract obligation would be impaired without the preamble, it is just as substantially impaired when the preamble is present. Preambles are not exercise of police power.

If a preamble could deprive a law of its character as an impairment of the obligation of a contract, without changing its effect on the contract, preambles would doubtless become frequent, and rights secured by the constitution might find themselves smothered under preambles.

Conceding, however, to the preamble everything that may be claimed for it, this would not, as we understand it, be a matter going to the jurisdiction of the court.

If police power can be urged as a reason why the contract is not impaired, the court must necessarily exercise jurisdiction in order to pass upon such defense.

"Whether the State had or had not impaired the obligation of this contract was not a question which could be properly passed upon on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith and was not a frivolous one."

City Railway Co. *vs.* Citizens' Railroad Co., 160 U. S., cited *supra* in Appellant's Principal Brief.

The police power of a State is subordinate to the constitution, not superior thereto.

Jacobson *vs.* Massachusetts, 197 U. S., 11.

It would not be subordinate to the constitution, but would itself be the supreme law, if the mere claim asserted in a municipal ordinance that the municipality was in the exer-

cise of police power sufficed to divest courts of their jurisdiction at the very threshold.

An examination of the contract will show that a case could hardly arise for which it does not make adequate provision without a resort to police power on the part of the city. The subjects of insufficiency of quantity or of pressure; of interruption of supply; of the need of extension and enlargements; of contaminated or unwholesome water; of change of source of supply; of purchase by the city, and all other questions liable to arise, are minutely dealt with in the contract itself. Had the city been content to act under the contract, and comply with its obligations, there would have been no need of preambles, or popular elections, or the building of waterworks of its own.

To hold that a city's police powers absolve it from a compliance with those provisions of the contract, which were intended to furnish some safeguard against capricious action while at the same time affording to the city the fullest measure of protection would be carrying the doctrine of police powers further than it has yet been carried.

It is suggested in the argument that the bill leaves room for the inference that there has been a failure on the part of the Waterworks Company to comply with the contract on its part.

This, however, is incorrect. The bill avers compliance with the contract on the part of the Waterworks Company and repudiation on the part of the city.

The bill in the foreclosure suit charges that the Waterworks Company has not complied *with the covenant in the deed of trust* to the effect that it would not permit the security to become impaired, but would make useful and proper additions, betterments, and improvements to the waterworks. But the averment is explained and made specific as follows:

"Your orator states that, owing to an unprecedented and protracted drought the sources of supply for the said water-

works have to a large extent failed for the time being; that it is within the power of the said Waterworks Company to provide for such a contingency by seeking and availing itself of other sources of supply, but that, as your orator is informed, owing to the attitude of the City of Columbus, which now is taking steps to provide a water supply of its own, the Columbus Waterworks Company is unable to sell its bonds reserved in its treasury for such purposes and which could have been sold except for the said attitude of said city, and therefore is unable to carry out the betterments and improvement in its water supply above mentioned."

By reason of this inability of the Waterworks Company to sell its bonds, these bondholders found it necessary to foreclose, procure the appointment of a receiver, and consent to the expenditure of $60,000 raised by a diversion of income belonging to them and the postponing of their security to receiver's certificates.

There is no inconsistency in these averments. A failure to deal with a sudden and unlooked-for emergency, by reason of an inability caused wholly by the fault of the city itself, was no breach of the contract.

This, however, is one of the questions which can best be dealt with in the light of the entire evidence, when the case is heard on its merits.

If appellees regard this an appropriate subject-matter for a motion to dismiss for want of jurisdiction, it would have been better to have made it a ground of the motion and thereby have afforded an opportunity to bring up so much of the record as bears thereon.

When the case comes up on its merits it will be shown whether or not the city had ground for complaint.

Respectfully submitted,

JOSEPH PACKARD,
OLIN J. WIMBERLY,
Of Counsel for Appellant.

APPENDIX.

ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA, 1902, P. 370.

COLUMBUS, WATER-WORKS FOR.

No. 54.

AN ACT to amend the charter of the city of Columbus, in Muscogee county, and the several acts amendatory thereof, so as to confer power and authority upon said city to construct, maintain, own and operate a system of water-works together with the necessary sites, ways, structures, canals, reservoirs for conveying and containing water, and the laying of pipes, conduits, and mains into and through said city, and the use of any stream or streams of water which may be deemed necessary and appropriate for that purpose, and to cross or lay along any street, or highway such pipes and mains, and appropriate and occupy the same, or any part thereof; to condemn and appropriate private property upon which to locate its works and to lay its pipes and mains, and to acquire and own property, real and personal, for same, both within the corporate limits of said city or anywhere else, and to have the power and authority generally to do and perform all things necessary to carry into effect the objects and purposes of this act; and to provide for the selection and establishment of a commission to be known as the "board of water commissioners," to whom shall be delegated the supervision and control of the construction, management, and operation of said water-works system, and to define the powers, authority and duties of said commission, and for other purposes.

SECTION 1. *Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by the authority of the same,* That the charter of the city of Columbus, in Muscogee county, be, and the same is, hereby amended as follows:

The said city of Columbus is hereby authorized and empowered to construct, build, maintain, own and operate a system or water-works, in any manner and to any extent that may be needful for the present and future use and requirements of said city of Columbus; that said city shall have the power to acquire and hold property, both real and personal, that may be necessary or appropriate for affording a complete and sufficient supply of reasonably pure and wholesome water for its own use and the use of the inhabitants thereof, whether the same be located within the limits of said city, or elsewhere, including the ownership of, and the dominion over, in whole or part, of the watershed or watersheds from which the water to be supplied is gathered, however large the tract of land may be that is requisite for that purpose.

SEC. 2. *Be it enacted by the authority aforesaid,* That the said city shall have power and authority to make or cause to be made such examinations and surveys for the proposed system of water-works contemplated by this act as shall be necessary or proper to the selection of the most advantageous location or locations, site, or sites, watershed or watersheds, right or rights, way or ways, for the location of said works and the necessary apparatus, appliances and equipment therefor, and for bringing the water from the source of supply to and distributing it in said city.

SEC. 3. *Be it further enacted,* That said city of Columbus shall have the power and authority to construct its works, and build such dams, canals, raceways and reservoirs as may be necessary for conveying and containing its water, and the laying of such pipes, conduits and mains into and through said city as may be necessary and appropriate for the distribution of said water for private and public use; shall have the power to use and employ for the purpose of said system of water-works any stream or streams of water, watercourse or watercourses, or any part of such waters which shall be deemed necessary and appropriate; and to use such water or waters by employing the same for power to run or move the necessary machinery, or for pumping through the pipes and mains and making distribution thereof over said city; and generally to do and perform all acts and things necessary for the construction, equipment, maintenance and operation of said system of water-works, and the distribution of its water as may be requisite and proper to carry into effect the object, scope and purposes of this act.

SEC. 4. *Be it enacted by the authority aforesaid*, That said city of Columbus shall have the power in the construction of said system of water-works and in making distribution of its water, to lay its pipes and mains under and along any street or streets of said city, or under and along any road or highway of this State; and should it be necessary, to cross, occupy, and appropriate with its works, pipes and mains such streets and highways, or any part thereof; and shall have the right to use the ground or soil under any road, railroad, highway, street, lane, alley, or court within this State, for the purpose of laying its pipes, conduits and mains, and constructing, enlarging and improving any of the work contemplated by virtue of this Act; provided, however, that said city shall not permanently injure any such railroad, highway, street, lane, alley or court, and the same be restored to its original condition and all damages thereto to be repaired; that said city of Columbus shall have the power to lease, buy, take and condemn any property, real or personal, in this State, as may be necessary for the location, construction, operation and security of said works; said city first making and paying just and adequate compensation therefor, as by law provided when private property is taken for public use.

SEC. 5. *Be it further enacted by the authority aforesaid*, That the rights and remedies of said city and all persons, firms or corporations whose property, franchises, easements or rights said city may seek to condemn or appropriate for the purpose herein contemplated, shall be in accordance with, and subject to, the provisions set forth and embodied in sections 4657 to 4686, inclusive, of the Code of Georgia for 1895, and the several acts of the General Assembly amendatory thereof.

SEC. 6. *Be it enacted by the authority aforesaid*, That said city of Columbus shall have the right and power to supply and furnish its water to private consumers, either for motive power or for drinking, sanitary and domestic purposes, charging such rates therefor as in the judgment of the corporate authorities is reasonable and just.

SEC. 7. *Be it enacted by the authority aforesaid*, That for the purpose of carrying into effect the objects of this act, the said city of Columbus shall have the power to make any contract or contracts or incur any obligation or obligations upon the means and resources of said city not repugnant to the constitution of this State, and shall have the right to issue

and sell its bonds when so authorized in the manner provided by law for the purpose of raising and supplying the necessary means to accomplish the aims and objects of this act.

SEC. 8. *Be it enacted by the authority aforesaid,* That before the said city of Columbus shall commence the construction of said system of water-works, and before the issue and sale of any of its bonds for that purpose, the mayor and board of aldermen of said city, at any regular meeting thereof, shall elect in the same manner as other officers of said city are elected, a board of commissioners, to be known as the "Board of water commissioners," who shall have the supervision and control of the building, construction, operation and management of said water-works system. The mayor and aldermen of said city shall fill all vacancies that may occur in said board at any regular meeting of council after such vacancy may exist, and that said board of water commissioners shall consist of five persons, one of whom shall be the mayor of said city, who shall be an *ex officio* member, and four other persons, all of whom shall be freeholders and citizens of the city of Columbus and qualified by law to vote at elections held for the selection of mayor and aldermen of said city.

SEC. 9. *Be it enacted by the authority aforesaid,* That the term of office of each member of said board of water commissioners shall be four years, except the members of the first board elected to serve; that the first election for members of said board shall be held at any regular meeting of council after the qualified voters of said city of Columbus have legally authorized at an election held for that purpose an issuance of the bonds of said city for the purpose of building and constructing a system of water-works, at which meeting of council the four persons to constitute the first board shall be elected, one of whom shall be elected to serve until the first day of January first following said election, one to serve until the first day of January thence next following, one to serve until the first day of January thence next following, and one to serve until the first day of January thence next following, so that the term of office of only — member will expire each year; and as the respective terms of office of each member of said board of water commissioners expire, the said mayor and board of aldermen of said city of Columbus, at the regular meeting of council to be held in July of each year prior to the expiration of the term of office of each member shall elect

a successor to the member of said board whose term expires in January following thereafter, who shall be elected for the full term of four years, so that one member of said board shall be elected in July of each year.

SEC. 10. *Be it enacted by the authority aforesaid,* That said board of water commissioners shall choose from their number annually one to serve and act as chairman of said board. The members of said board of water commissioners shall each, before entering into the discharge of his duties, take and subscribe to the following oath: "I (name), do solemnly swear (or affirm) that I am duly qualified to serve as a member of the board of water commissioners of the city of Columbus; that I will, to the best of my ability, faithfully discharge all of the duties and obligations devolving upon me as a member of said board without fear, favor and affection, and will subserve the best interests of the city of Columbus, so help me God," which oath shall be taken before any officer authorized by law to administer oaths.

SEC. 11. *Be it enacted by the authority aforesaid,* That a majority of said board of water commissioners shall constitute a quorum for the transaction of business, and all contracts, engagements, acts and doings of said board within the scope of their duty or authority, shall be obligatory upon and be considered in law as if done by the mayor and board of aldermen of said city of Columbus. Said board shall have the power and authority to make rules and regulations for the conduct of its affairs, and shall keep a record in books to be purchased and kept for that purpose of all acts and doings of said board, which said books shall be subject to examination at any time by persons authorized to do so by the mayor and board of aldermen in said city; and said board shall make reports to the mayor and board of aldermen of said city of Columbus of the operation and condition of said water-works in accordance with any ordinance or resolution that may be passed by said mayor and board of aldermen with reference to same.

SEC. 12. *Be it further enacted,* That said board of water commissioners shall have the power to appoint a competent engineer for the construction of said water-works system and to fix his compensation while so employed; also the power to appoint a secretary for said board, and employ such managers, clerks and laborers, as may from time to time be found needful in building and constructing said system and in the

operation thereof when completed, and to fix their salaries and compensation; that said board may purchase from time to time such material, machinery, apparatus and appliances as may be needed in the building, construction, maintenance and operation of said works; that all contracts made by said board for material or for construction of said works, or any part thereof, which shall involve an expenditure of over two hundred dollars, shall be made in writing, and of each contract two copies shall be made, one of which shall be deposited with the clerk of council for the benefit of the mayor and board of said city, and one to be retained by said board, and said board shall have the authority to require from any person or persons firm or corporation with whom they contract, satisfactory security for the faithful performance of said contract, according to its terms, and no member of said board shall be interested directly, indirectly or remotely in any contract relating to the construction or operation of said works.

SEC. 13. *Be it further enacted*, That said board of water commissioners shall regulate the distribution and use of the water in all places and for all purposes whenever the same may be required, and shall fix the price for use thereof and the terms of payment therefor; they shall erect such number of public hydrants and in such places as the mayor and board of aldermen of said city may designate, for the purpose of extinguishing fires, watering the streets, and such other public uses as said mayor and board of aldermen may direct, and shall make all necessary connections with pipes and mains into all buildings used by said city of Columbus and as said mayor and board of aldermen may require. That said board of water commissioners shall have full power and authority to require payment in advance for the use of water furnished by them in or upon any building, place or premises; and in case prompt payment shall not be made, they may shut off the water from such building, place or premises, and shall not be compelled to again supply said building, place or premises with water until all arrears, with interest thereon, shall be fully paid. That said board shall have the power to make rules and regulations respecting the introduction of water into or upon any premises and may regulate the use thereof in such manner as to them shall seem necessary and proper; and the members of said board, and all engineers, superintendents or inspectors in their service and employ, are hereby authorized and empowered to enter at all

seasonable hours any building or other place, where said water is taken and used, and when unnecessary waste thereof is known or suspected, and examine and inquire into the cause thereof. They shall have full power to examine all service pipes, stop-cocks, and other apparatus connected with said works, for the purpose of ascertaining whether the same are of the character and dimensions, and fixed in the manner required by the rules and regulations of said board, and if necessary the supply of water may be shut off until the required examination is made and any alterations and repairs necessary are completed.

SEC. 14. *Be it further enacted,* That whatever sum or sums of money that may be provided by the mayor and board of aldermen of the city of Columbus, either from the sale of bonds or otherwise, for the purpose of building and constructing a system of water-works as herein provided for, shall be paid over to said board of water commissioners, and by them used and paid out for that purpose only, and should any surplus be left thereof after final completion of said system, shall be turned over to the treasurer of said city of Columbus, and by him used only for the payment of principal and interest on any bonds that may have been issued and sold for that purpose.

SEC 15. *Be it further enacted,* That all money coming into the hands of said board of water commissioners from water rents and the sale of any apparatus and appliances or other property, or from any other source, after paying for any necessary extensions, repairs and expenses of operation, shall be paid to the treasurer of the city of Columbus semi-annually and at least fifteen days prior to the time of the payment of any principal or interest that may become due on any bonds that may have been issued for the purpose of building and constructing any system of water-works as is herein provided for, and the same shall be used by said city treasurer only for the purpose of paying any principal and interest then to become due; but if the revenue and receipts of money derived from the operation of said water-works for any year be more than is sufficient to discharge the interest and principal on said bonds maturing in that year, then such surplus may be used and appropriated by the mayor and board of aldermen of said city for any other public improvement in said city as to them may seem proper.

SEC. 16. *Be it further enacted,* That said "board of water commissioners" shall be considered a subordinate branch of

the city government of Columbus, and shall conform in their actings and doings to all ordinances that may be passed by the mayor and board of aldermen of said city of Columbus; and the mayor and board of aldermen of the city of Columbus may at any time remove any member which they may have elected to said board, if it shall satisfactorily appear, after reasonable notice to the parties, and hearing of the causes of complaint and answers thereto, if any should be offered, that the member whose removal is sought has been guilty of maladministration or neglect of the duties of his office, that his removal will be right and proper, and two-thirds of the aldermen of said city council shall concur in such removal.

SEC. 17. *Be it further enacted*, That the members of said board shall not receive any compensation for their services, but shall be paid and refunded all reasonable expense which they may incur in the performance of their duties; that the mayor and board of aldermen of said city shall be authorized, by and through a committee of their own number, or by any person they may select, to inspect at their pleasure, the state and condition of the works, and property thereto belonging, as also all books and accounts pertaining to the affairs conditioned by them, and the said board shall give and furnish them any reasonable facility and assistance in making such inspections.

SEC. 18. *Be it further enacted*, That any person or persons who shall maliciously or willfully divert the water, or any portion thereof, from the works contemplated by this act, or shall corrupt or shall in any manner render the same impure, or shall destroy or injure any canal, aqueduct, pipe, conduit, main, machinery or other property used or required for procuring or distributing the water, such person or persons, and their aiders and abetters, shall forfeit to said board, to be recovered in an action of trespass, treble the amount of damages besides cost of suit which shall appear on the trial to have been sustained, and all such acts are hereby declared to be misdemeanors under the laws of this State, and the person or persons charged therewith, if found guilty, shall be punished as for a misdemeanor, as provided by law.

SEC. 19. *Be it further enacted*, That all laws and parts of laws in conflict with this act be, and the same are, hereby repealed.

Approved December 3, 1902.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. [redacted]0

MERCANTILE TRUST & DEPOSIT COMPANY OF BALTIMORE, APPELLANT,

vs.

CITY OF COLUMBUS, APPELLEE.

MOTION TO ADVANCE UNDER 32d RULE.

Now comes The City of Columbus, the appellee in the above-entitled cause, and moves the court to advance the hearing in said cause in conformity with rule 32 of the court, for that the cause comes to this court upon the certificate of the court below under section 5 of the act of March 3rd, 1891, chapter 517, the only question in issue being the question of the jurisdiction of the court below.

Wherefore the appellee prays that the cause may be advanced to be heard by this court, in conformity with its rules, on a day hereafter to be noticed for submission by the appellee.

WILLIAM A. WIMBISH,
Of Counsel for Appellee,
525 *Prudential Building, Atlanta, Ga.*

[Endorsed:] File No. 19,805. Supreme Court U. S., October term, 1905. Term No. 303. Mercantile Trust & Deposit Co., &c., app't, *vs.* City of Columbus *et al.* Motion to advance under the 32d rule. Filed Nov. 25, 1905.